



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

October 2, 1997

Mr Richard Lewis

Louisville, KY 40205

RE MUR 4012
Richard Lewis

Dear Mr Lewis

As you were previously notified, based on the complaint and information supplied by you, the Commission, on July 18, 1995, found that there was reason to believe that you violated 2 U S C § 441a(f), and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that you knowingly and willfully violated 2 U S C § 441a(f)

The Commission may or may not approve the General Counsel's recommendations Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe violations have occurred

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Celebrating the Commission's 20th Anniversary

YESTERDAY TODAY AND TOMORROW
DEDICATED TO KEEPING THE PUBLIC INFORMED

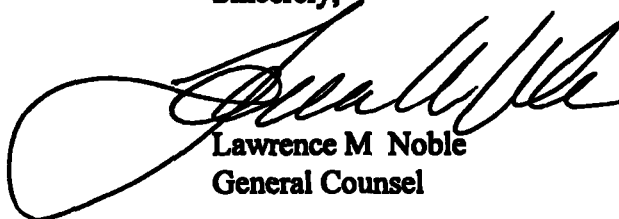
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Should you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 219-3690

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence M. Noble", with a large, stylized loop at the beginning.

Lawrence M Noble
General Counsel

Enclosure
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Richard Lewis

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MUR 4012

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was initiated by a complaint submitted by Maureen Keenan. The complaint alleged that Frank G. Simon, M.D., the Freedom's Heritage Forum ("Forum") and Arthur Cermunara, as treasurer, reported certain expenditures as independent when, in fact, the expenditures qualified as contributions because of coordination between the Forum and the Lewis for Congress Committee ("Lewis Committee"). Based upon the information presented, the Commission found reason to believe that Richard Lewis violated 2 U.S.C. § 441a(f), and conducted an investigation.

II. FACTUAL AND LEGAL ANALYSIS

A. COORDINATION ISSUE

1. Applicable Law

The Federal Election Campaign Act of 1971, as amended (the "Act") limits the amount that persons other than multicandidate committees may contribute to any candidate for federal office to \$1,000 per election. 2 U.S.C. § 441a(a)(1)(A). A "contribution" includes "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). Independent expenditures are not limited by the Act. See Buckley v. Valeo, 424 U.S. 1, 39 (1976). The Act defines an "independent expenditure" as one made "by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or

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consultation with any candidate," or the candidate's authorized committee or agent, and "which is not made in concert with, or at the request or suggestion of" any candidate or candidate's agent 2 U S C § 431(17)

The Commission's regulations define "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate" to mean any "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication " 11 C F R

§ 109 1(b)(4)(i) There is a presumption that expenditures are coordinated if they are made when based on information about the candidate's "plans, projects, or needs" provided to the expending person by the candidate, or by the candidate's agent(s), with a view toward having an expenditure made 11 C F R § 109 1(b)(4)(i)(A) An expenditure which does not qualify under 11 C F R § 109 1 as an "independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted " 11 C F R

§ 109 1(c)

On a number of occasions, the Commission has considered the nature and purposes of an event sponsored by a group and involving the active participation of a candidate for Federal office to determine if the event results in a contribution or expenditure on behalf of the candidate. The Commission has found that a contribution or expenditure would result if the event involves (1) the solicitation, making or acceptance of contributions to the candidate's campaign, or (2) communications expressly advocating the nomination, election or defeat of any candidate. AO 1996-11, AO 1992-5, AO 1988-22. In Advisory Opinion 1988-22, the Commission stated that the active participation by candidates for Federal office as featured speakers at luncheons

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sponsored by an organization would involve coordination with the candidate in the providing to and receipt of a benefit for the candidate

The Act addresses violations of law that are knowing and willful See 2 U S C § 437g(a)(5)(b) The knowing and willful standard requires knowledge that one is violating the law Federal Election Commission v. John A. Dames for Congress Committee, 640 F Supp 985 (D N J 1986) A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false " United States v. Hopkins, 916 F 2d 207, 214 (5th Cir 1990) An inference of a knowing and willful violation may be drawn "from the defendants' elaborate scheme for disguising" their actions Id at 214-15

2. Facts Ascertained through Discovery/Analysis

Dr Frank G Simon, an allergist, is the founder, president and sole officer of the Freedom's Heritage Forum located in Louisville, Kentucky The Forum, an organization promoting pro-life and other issues, had been in existence for ten to fifteen years as a state PAC before becoming a federal PAC on March 3, 1994 Dr Simon runs the Forum from his home or office, directs Forum volunteers, and controls Forum finances He is the only individual authorized to sign checks and make disbursements on behalf of the Forum and has been performing the underlying duties of treasurer for the Forum

Richard Lewis knew Dr Simon and was familiar with the Forum's positions on the issues In fact, the Forum had endorsed Lewis in his 1992 congressional race In a letter to this Office, Lewis had admitted that, prior to becoming a candidate in the general election, he had spoken with Dr Simon, among others, "to determine their interest and opinions about [his]

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candidacy and chances .” Lewis had also stated that “As the only pro life candidate in the general election, . [he] felt [he] could count on the support of [the] Forum ” In his deposition, Lewis testified that two to three weeks after the primary election, prior to his becoming a candidate, he met Dr Simon by chance and that he told Dr Simon he was considering running as an Independent in the general election and discussed some campaign issues Lewis further testified that Dr Simon said he was in a hurry to get somewhere but was interested in further discussions with Lewis Dr Simon confirmed in his deposition that he did meet Lewis by chance and that Lewis spoke of his plans to register as an Independent Dr Simon’s testimony, however, suggests that the encounter with Lewis took place before rather than after the primary because he said Lewis noted that he would register to run if Hardy lost

Thus, this initial discussion between Lewis and Dr Simon conveyed to Simon that Lewis was committed to running and provided him with information about Lewis’ views At the same time, Dr Simon’s expressed interest in discussing this further with Lewis and conveyed to Lewis that he was interested in the campaign

The second meeting between Dr Simon and Lewis naturally followed from their previous discussion Dr Simon testified that he and a small group made up of Ed Parker, Omer Chesser, and Corley Everett, among others, met in his medical office for a private evening meeting Dr Simon further testified that the purpose of the meeting was to select a candidate to run against Susan Stokes in the general election According to Dr Simon, Richard Lewis and Dennis Ormerod, the two contenders, each made a presentation in which they discussed their background, experience, campaign plans, and views on various issues, and also answered questions Afterwards, Lewis and Ormerod left the room while the group debated who would

make the better candidate and then voted to select Lewis as the candidate to support in the general election. Lewis and Ormerod returned to the room and were informed of the decision. The meeting was then adjourned.

In his deposition, Lewis maintained that he was uncomfortable that the meeting was held at Dr. Simon's office and that Simon was connected to the meeting. Lewis also maintained that afterwards he explained to the people who had attended the meeting what the campaign laws were and made it abundantly clear that there could be no "collaboration" or "relationship with Dr. Simon or anyone else." Both Omer ("Shorty") Chesser and Lewis tried to downplay Simon's presence at the meeting by testifying that all Simon did was "to furnish a place for a meeting" and that he "was not actually part of the meeting" though he stopped in briefly to pick up something. Dr. Simon, however, clearly testified that he was present throughout the meeting and took part in the selection of the candidate.

This meeting was essentially a recruiting session for the Forum and provided Dr. Simon with more information on Lewis' plans, projects, and needs and reinforced Simon's view of Lewis' commitment to run. This meeting also undoubtedly reinforced Lewis' view that he would have the Forum's endorsement and support in this race.

Afterwards, Lewis circulated petitions and secured signatures from registered voters to have his name placed on the ballot in the general election. Dr. Simon may have assisted in this effort as well. Ed Parker and Omer Chesser accompanied Lewis when he went to file papers declaring his candidacy. Later, Lewis benefited by having several Forum volunteers on board including Bob Ross, his volunteer treasurer, Ed Parker, his campaign manager, Omer Chesser, and, Boyd Pendleton.

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Lewis wanted a CPA as his treasurer, and Lewis explained that Hardy was instrumental in getting Ross, a CPA, to serve as volunteer treasurer for the Lewis campaign. Both Dr. Simon and Ross acknowledged that Ross was working as a volunteer accountant for the Forum (helping prepare Forum committee reports) while also working for the Lewis campaign.

Lewis acknowledged receiving a questionnaire from the Forum. Lewis testified that Ed Parker completed the questionnaire and returned it. The Forum as well as Dr. Simon endorsed the Lewis campaign.

On September 27, 1994, several weeks from the general election, the Forum hosted an event at St. Luke's Church. Although the flyer announcing this event described it as a "Free Banquet" and mentioned other candidates, it nevertheless highlighted Lewis by, among other things, including a photo of Lewis, and stating the purpose for the event as "to hear debates by Richard Lewis and other leading candidates," and to obtain tabloids about Richard Lewis and other candidates for further distribution. The front of the flyer, entitled "Congressional Candidate Report" and dated "General Election Tuesday, November 8, 1994," contains a chart comparing Lewis' pro-life stance and stances on other issues with opposing views of Susan Stokes and Mike Ward, the other candidates in the general election. The flyer also contains a statement about Lewis being able to win: "We have the Pro-Abortionists right where we want them, divided and fighting each other. Now Richard Lewis can win with only 40% of the vote." The back of the flyer contains information about another Forum event and a response slip for those wishing to attend the banquet or other Forum events, and to help distribute the Forum's "The Richard Lewis Tabloid" which, the flyer states, would be made available at the event.

Dr. Simon testified that the information contained in the flyer came from newspapers and questionnaires but that he was not sure how the Lewis photo was obtained

Dr Simon testified that he sent out invitations to this event to volunteers and to candidates but that the candidates' invitations were different in that the candidates' invitations would not have included Lewis' photo A copy of an invitation dated September 14, 1994, that was sent to Susan Stokes, who did not attend, describes the event as a "banquet for precinct captains" and states that the invitee's opponent has also been invited and that each candidate will get 2 minutes to debate and one minute follow-up

About 200-300 people attended the event, including members of the press, Lewis, as well as several other state or local candidates Lewis was the only federal candidate who attended though Susan Stokes was invited and other federal candidates were probably also invited Lewis and the other candidates brought their own campaign literature to distribute at the event

Dr Simon testified that he hosted the event which included a dinner, introduction of candidates by Simon, candidates' presentation, and distribution of tabloids Dr Simon explained that the Forum tabloids, including the tabloid promoting Lewis which had been described in the flyer announcing the event, were distributed at the end of the evening, after the candidates spoke, and that he encouraged people to pick up the tabloids for further distribution in their precincts

Dr Simon also testified that this was the first time the Lewis tabloid was made public and that Lewis was probably seeing it for the first time At the event, each candidate made a brief speech with Lewis speaking last Lewis said that he left right after his speech

The tabloid, entitled "Congressional Candidate Report," contains some of the same material found in the front page of the flyer announcing the event (same title, same chart

comparing the candidates' positions and photo of Lewis) The front of the tabloid features a photo of Lewis and three short pieces promoting Lewis' positions on various issues and comparing them with that of his opponents in the general election The front of the tabloid also contains a photo of Stokes with Gloria Steinem (used in the Forum's earlier "Loyal Republican" Hardy tabloid) and a photo of Ward (identified in the caption as giving a speech at a pro-abortion rally) The back of the tabloid contains a chart comparing the positions of Lewis, Ward, and Stokes, followed by quotes from each of these candidates, and a highlighted statement expressly advocating the election of Lewis which reads "Registered Democrats and Republicans can vote for Richard Lewis who actively opposes the liberal Clinton Agenda "

Lewis testified that he did not realize that the Forum was sponsoring the event until he arrived at the event Lewis also testified that he first saw the Lewis tabloids when he arrived at the event and that he was also present when Dr Simon encouraged the attendees to distribute them Lewis, however, testified that he had no prior knowledge of and had nothing to do with either the Forum's announcement of the event or the Lewis tabloid Lewis further testified that had he known about these flyers before the event, he would have declined to attend Finally, Lewis explained that he quickly realized that the tabloid could cause problems and resolved to instruct his staff not to get involved in any distribution of Forum materials Dr Simon testified that after the event and shortly before the general election on November 8, 1994, the Forum further distributed the "Congressional Candidate Report" tabloid by mail and door-to-door delivery

Lewis testified that sometime after the banquet, an individual came to his campaign headquarters waving one of the Forum's Lewis tabloids and exclaiming how she was going to

support him Lewis testified that as soon as he became aware that the Forum tabloid he had seen at the St Luke's event was being further distributed, he called a meeting and informed his staff they could not distribute any Forum materials on behalf of his campaign and that his campaign could only put out materials prepared, printed and authorized by his campaign

Dr Simon testified that the Forum also mailed out a "Pro-Family Sample Ballot" a week or two before the general election The front of the sample ballot expressly advocates the election of Lewis and other clearly identified candidates by showing an arrow by Lewis' name and the names of other candidates endorsed by the Forum, as well as notes for each endorsement The note for Lewis reads, among other things "Richard Lewis is the only Pro-Life/Pro-Family candidate in the race " The back of the ballot includes an "Explanation of Ballot" which sets out the Forum's criteria for selecting candidates, a solicitation for "pro-life/pro-family precinct captain" and short note signed by Dr Simon

The Lewis campaign received relatively few contributions Late in the campaign, it only received four \$1,000 contributions, two of which were personal contributions from the Simon family

In the general election on November 8, 1994, Mike Ward won the election with 45% of the vote, Stoke garnered 43% of the vote and Lewis 12% of the vote Ross resigned as Lewis' treasurer on November 2, 1994 After the general election, Ross became the paid accountant for the Forum, the American Family Association, and also personal CPA for Dr Simon's medical practice and his family

The information gathered by Dr Simon through discussions with Richard Lewis helped convince Dr Simon that the Forum could embark on this expenditure campaign with confidence

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that Lewis was committed to running while assuring Lewis that he could count on the Forum's support. These discussions tainted the independence of the Forum's expenditures on behalf of Lewis from the outset because they were based on the Forum's knowledge of Lewis' plans, projects, and needs provided by Lewis to Dr. Simon with an expectation of support. In addition, Lewis' attendance and participation at the Forum-sponsored event, where the Forum distributed tabloids promoting his candidacy, constituted coordination between Lewis and the Forum. AO 1988-22

The Forum disclosed on its 1994 October Quarterly Report only \$1,000 in independent expenditures made on behalf of the Lewis campaign. In its subsequent reports, the 12-Day Pre-General and 30-Day Post General Election Report, the Forum disclosed \$818.50 and \$4,973.10 respectively in "Other Federal Operating Expenditures" made for the general election.

In his deposition, Dr. Simon admitted that the amounts noted as "Other Federal Operating Expenditures" (\$818.50 and \$4,973.10) were probably for mailing of tabloids promoting Lewis. In addition, this Office obtained copies of documentation showing that Dr. Simon paid the Publisher's Printing Company \$4,000 for the production of the "Congressional Candidate Report" tabloid. An amended 12-Day Pre-General Report was filed disclosing the \$4,000 and an additional \$1,574.06 as disbursements for the general election. In its 1994 October Quarterly Report, the Forum disclosed a total of \$1,950.63 in disbursements for food for volunteers during September 1994. Dr. Simon was asked about these expenses and testified that they were probably incurred for the candidate night at issue.

In sum, the Forum made contributions to Richard Lewis totaling \$14,066.29 (\$12,365.66 for the Lewis tabloids plus \$1,700.63 for the event).

Throughout his deposition, Richard Lewis vehemently maintained that he ran an independent campaign because he was familiar with campaign finance rules and knew that there could be no cooperation or relationship between his campaign, Dr Simon and the Forum, or anyone else. Yet, Lewis, by his own admissions and despite his acknowledged discomfort, remained and participated in situations in which Dr Simon and the Forum were directly involved, i.e., the recruitment session in Dr Simon's office and the Forum event at which tabloids promoting Lewis were distributed. Thus, even if Lewis did not seek these meetings with Dr Simon or knew beforehand that Dr Simon would be present, his participation at these events in light of his knowledge and concerns about running afoul of the law support an inference that the violations were knowing and willful.

In light of all the foregoing, the General Counsel's Office is prepared to recommend that the Commission find probable cause to believe that Richard Lewis in his individual capacity as a candidate knowingly and willfully violated 2 U.S.C. § 441a(f) by accepting \$13,066,29 in excessive contributions from the Forum.

III. RECOMMENDATION

Find probable cause to believe that Richard Lewis knowingly and willfully violated 2 U.S.C. § 441a(f).

Date

10/2/97

Lawrence M. Noble
General Counsel